

January 20, 2009

To: Docket ID No. MARAD-2008-0096 (Electronic Submittal)

RE: America's Marine Highway Program; Interim Final Rule

NESCAUM (Northeast States for Coordinated Air Use Management) submits the following comments on the Maritime Administration's (MARAD) Interim Final Rule¹ on America's Marine Highway Program. NESCAUM is an association of state air pollution control agencies in Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and Vermont.

The ultimate goals of this rule, as we understand them, are to promote fuller utilization of marine corridors for the movement of freight and other goods around the United States and to reduce congestion on landside transportation corridors. As a result, MARAD expects that fewer trucks and rail cars will be needed for the same purpose and therefore some portion of future traffic congestion will be mitigated within land-based transportation systems (i.e., interstate highways and rail corridors). Further, MARAD appears to assume that such congestion mitigation will reduce air pollution and energy consumption and increase freight system reliability. Generally, NESCAUM supports congestion mitigation efforts where they can be demonstrated to reduce air pollution and energy consumption. However, based on the information provided in the Federal Register notices, MARAD does not provide the analysis necessary to support its assumption that "any overall environmental impact should be positive."

MARAD correctly points out that the present state of freight and goods movement is predominantly land-based. The bulk of imported goods arrives at major U.S. ports where they are loaded onto long-haul trucks or rail cars. Trucks can make extensive use of six interstate "Corridors of the Future," identified in the notice, and other highway routes, transporting goods hundreds of miles and adding to road congestion in the process. The major rail corridors are similarly utilized. Goods subsequently are delivered directly to end users or to regional distribution centers for transfer to short-haul trucks or regional rail, enroute to the end user.

Developing the Marine Highway Program has the potential to reduce congestion on certain highway and rail corridors, but to a yet to be determined extent, it may also redistribute the land-based transport and supply infrastructure in significant ways. Ultimately, goods routed along marine highway corridors must return to land for final distribution. If the Marine Highway Program achieves its goal of increasing the market share of goods transported along marine highway corridors, then small to medium-sized U.S. ports will need to increase their capacities to receive goods and dispatch those goods along connecting land-based highway and rail corridors. Thus, while the program might conceivably reduce emissions and congestion along major

¹ 73 Fed. Reg. 59,530 (Oct. 9, 2008); 73 Fed. Reg. 64,885 (Oct. 31, 2008)

highway and rail corridors and at major ports, shifts in routes could lead to localized emissions and congestion increases in new areas.

Nothing in the notice indicates that MARAD has undertaken an effort to evaluate the environmental impacts associated with the redistribution of land-based transportation and cargo handling infrastructure that will result from a modal shift to marine highway corridors. In the cursory Environmental Assessment paragraph in the notice, MARAD cites as the basis for its conclusion (i.e., "any overall environmental impact should be positive"), a December 2007 report from the Texas Transportation Institute, entitled "A Modal Comparison of Domestic Freight Transportation Effects on the General Public." This report does not address the Marine Highway Program, as implied in the notice. Rather, the report presents a hypothetical situation; i.e., what would the impact be if all existing waterborne freight were shifted to long-haul truck or rail modes? The report concludes that on a ton-mile basis, overall emissions would be lower if the present waterborne transport system were retained. This conclusion is primarily based on comparison of the carrying capacity of barges, relative to trucks and rail cars. Besides being irrelevant to the scenarios under the proposed Marine Highway Program, the report makes a number of key assumptions that skew the comparison of emissions between the waterborne and the land-based fleets. For example, the report assumes that the truck fleet consists of model year 2005 and older trucks (i.e., failing to account for significant emissions improvements beginning in model year 2007). In addition, the report assumes that all trucks make their return trips empty (i.e., zero ton miles for half the distance traveled). Finally, the report assumes that highway diesel fuel has a sulfur content of 500 ppm (i.e., failing to account for the 15 ppm sulfur mandate).

MARAD's apparent basis for its cursory environmental assessment is embodied in its statement that "designation of Marine Highway Corridors and Marine Highway Projects does not have an immediate environmental impact. Following designation, individual Corridor and Project components that may have an environmental impact will be determined as they are identified." This might have been a legitimate reason to forego a rigorous assessment if not for the fact that the interim final rule does not strictly require proponents to prepare environmental assessments as a condition for designation of corridors and projects.

The process for designating marine corridors, as outlined in the rule, involves sponsors submitting information in response to Department of Transportation solicitations. While environmental benefit is one of the referenced information categories to be addressed by sponsors, the rule language implies that it's optional. To quote, "The recommendation should provide, if known, the savings over status quo in...emissions...that could be derived from shifting some capacity to the proposed Marine Highway Corridor." Rather than being an absolute requirement, it simply *should* be provided *if known*. Given that addressing environmental impacts apparently is optional on the part of the proponent, it directly contradicts MARAD's earlier assertion that environmental impacts will be determined later in the process.

In addition, the rule provides that in “certain cases the Secretary of Transportation may designate a Marine Highway Corridor without receipt of a recommendation,” apparently without any supporting information, such as an environmental assessment. For waterways that parallel the most congested interstate highway corridors (e.g., Corridors of the Future) the rule states that designations as Marine Highway Corridors “will be fast-tracked,” again apparently without an environmental assessment to support the designation. The environmental assessment requirement on applications for individual marine highway projects is similarly weak, stating that the application *should* “address the savings over the current practice in...emissions... that would result from the proposed operation.” As is the case with corridor designations, there is no absolute requirement and there is no guidance as to how the *savings* are to be determined.

In the absence of clear directives to analyze the environmental impacts associated with and following designations of individual Marine Highway Corridors and Projects, it is not difficult to reach a conclusion that the rule itself, establishing America's Marine Highway Program, will have an environmental impact. The point made by MARAD that the impact may not be immediate is immaterial. In such a circumstance, pursuant to the National Environmental Policy Act (NEPA),² agencies of the Federal Government are required to include in their proposed actions a detailed statement on the environmental impact and consult in advance with and obtain comments from other federal agencies having special expertise with respect to the environmental impact. Because of the air emissions implications of the proposal, MARAD must consult with the Environmental Protection Agency (EPA).

In fact, according to MARAD's own Administrative Orders,³ preparation of an environmental document is required unless a categorical exclusion applies. While MARAD's list of categorical exclusions references promulgation of rules, this exclusion applies when there is no “potential to cause a significant effect on the environment.” For reasons previously stated, the rule in question does not fit with this exclusion.

It also appears that MARAD's approval of individual Marine Highway Projects could constitute a *federal action* under General Conformity rules promulgated under the Clean Air Act (CAA).⁴ As such, MARAD could be required to make a conformity determination for each air pollutant for which the total direct and indirect emissions are projected to exceed specified thresholds in nonattainment and maintenance areas. In addition, if localized land-based transportation infrastructure must be modified in response to Marine Highway Projects, there may be implications under Transportation Conformity rules of the CAA.⁵ Specifically, if such projects are to receive funding through the Federal-Aid Highway program, require Federal Highway Administration approval, or are otherwise deemed to be regionally significant, then conformity determinations are required. At a minimum, the proposed rule should reference conformity

² 42 U.S.C. §4332(2)(C)

³ “Procedures for Considering Environmental Impacts”, Maritime Administrative Order No. 600-1, July 23, 1985.

⁴ 40 C.F.R. § 51.850 et seq. and § 93.150 et seq.

⁵ 40 C.F.R. § 93.100 et seq.

determinations as potentially a part of the process for ultimate designation of Marine Highway Projects.

In conclusion, we see potential in marine highways having a positive role in overall transportation sector strategies to improve air quality while reducing traffic congestion, energy usage, and greenhouse gases. To ensure such benefits will occur, however, requires the types of analyses described above. Such benefits cannot be automatically assumed. We therefore request that MARAD take the following actions as part of this rulemaking:

- Prepare and publish the appropriate environmental assessment under NEPA
- Consult with EPA on potential air quality impacts
- Reference or incorporate applicable Clean Air Act conformity requirements in the rule
- Republish an amended rule as a proposal in conjunction with publication of the NEPA document.

If you have any questions, feel free to contact Eric Skelton of my staff at (617) 259-2028 or eskelton@nescaum.org.

Sincerely,



Arthur N. Marin
Executive Director

Cc: NESCAUM Directors